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FILED
NOV 5 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-338

In The

Supreme Court of the United States

October Term, 1998

ODIE N. FIELDS,

Petitioner,

vs.

MADELEINE K. ALBRIGHT,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Contrary to the Department's suggestions, the Court of appeals erred in its decision because the opt outs met the conditions for opting out in the *Amchem Prods., Inc. v. Windsor,* 117 S.Ct. 2231 (1997) and *Eubanks v. Billington,* 110 F.3d 87 (D.C. Cir. 1997). Petitioners filed their protests against the proposed settlement in their uncertified class action case in a timely manner. Yet the court of appeals still refused to grant the Petitioners opt out requests by ignoring their timely requests as well as meeting all of the conditions in *Eubanks* and *Amchem* demonstrating that Petitioners affirmatively care about their individual claims.

The district court properly allowed opt out during the settlement of the case through its order and certification of the group. *See County of Suffolk v. Long Island Lightning Co.,* 907 F.2d 1295 (2nd Cir. 1990); *cf. Bauman v. United States District Court,* 557 F.2d 650 (9th Cir. 1997).

1. In its opposition the Department responds that Rule 23 makes no provision for excluding members of classes certified under (b)(1) or (b)(2) (Opp. 3). Thus, in so seeking to justify its position it ignores the fact that Rule 23 in the 1960s is much different in the 1990s. Then Rule 23 automatically enjoined cases because they dealt with segregation as opposed to today when injunctive relief is applied in employment situations. The appendix "Settlement On Class Action For The Courts And Intellectual Property Subcommittee On Judiciary Of The House Of Representatives is used as background information to Rule 23. Pet. App. 1-24.

Employment is the key issue. The Petitioners have lost their positions and any chance of a career as Foreign Service Officers as well as retirement, benefits, etc. due to racial discrimination, retaliation and for some inexplicable reason no chance of reinstatement in the settlement agreement. The Petitioner was arbitrarily removed from his position, arbitrarily removed, replaced on the reinstatement list and refused an explanation as to why he was removed and replaced on the list, and denied the opportunity to even apply for reinstatement even after being directed to do so by the district court. The Department refused to respond to the written and telephone requests from the Petitioner. The district court was informed of this matter but it did not take any action.

2. With respect to the monetary awards, the Petitioner was awarded $78,000, compared to his $51,000 salary in 1988 and the $738,000 (Pet. Reply App. 25) he was calculated to receive in 1995. The difference is significant, unreasonable and unfair. Furthermore, even more unfair is something that money can not take the place of and that is not being able to be an accomplished Foreign Service Officer by being denied the opportunity.

3. The whole argument is about the fairness of the settlement and reinstatement. The district court issued an order on the fairness of the settlement for non opt outs. The Judge never determined the outcome of (b)(2) to (b)(3). He applied it across the board and declared that it was fair to them. Then the court of appeals stated that it was fair to everyone. The decision was unfair because:

(1) reinstatement was not offered to the nine opt outs; (2) why were they not offered reinstatement; (3) how was the reinstatement list devised; and (4) why was the Petitioner's name replaced on the reinstatement list with all his requests for answers ignored and consequently refused an answer? These problems are similar to those in *Holmes v. Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983).

4. Contrary to the Department's argument, the court of appeals erred in applying (b)(2) as opposed to (b)(3). The following are the reasons that the court of appeals erred: (1) failing to address the opt out requests in Rule 23; (2) failing to analyze whether the case was (b)(2) or (b)(3) in view of the shift of the case to greater monetary damages caused by reinstatement denials; (3) denying due process rights to Petitioners; (4) not ruling on the arbitrary manner that the nine were not reinstated.

There is a serious question as to whether the case is a (b)(2) or a (b)(3) action. Class counsel submitted a motion requesting that the case be certified as a (b)(2) or (b)(3). The Department did not oppose the request. However, Class counsel did a highly questionable thing. They hastened to settle the case and stipulated a no opt out clause in the agreement over the protests of their clients and signed an agreement with opposing counsel that they would remain silent on the opt out issue, and agreed not to represent any clients who chose to opt out. This would appear to be acts of betrayal and abandonment of their clients and joining the opposition. Shortly thereafter, the

leading law firm Akin, Gump, Strauss, Hauer, and Feld abruptly withdrew from the case. The question is that if the class members cannot opt out of a (b)(2) class action, why was there a last minute effort to stipulate the "no opt out" clause in the settlement?

Finally, the Department has suggested that the Petitioner should return to the district court to resolve acts of harassment and retaliation, which occurred during the settlement of the case. (Opp. 14) The district court allowed the Petitioner to opt out pursuant to individual rights and fairness of the settlement. Fields has taken all the legal steps available to bring his case to a fair and equitable resolution. The district court told Fields to apply for reinstatement, including writing a letter to Secretary of State Albright but they would not even let him apply nor would they respond to his letter or his telephone calls. To rectify the court of appeals to a correct action that said Petitioner should be asking for in district court refer to *Amchem* because the case focuses on the analysis of an opt out situation. Rule 23(b)(3) cases allow opt out because here the ground rules are set and the Petitioner met them due to meeting the conditions and the filing period.

In conclusion, the Supreme Court should overturn the court of appeals decision because of the following:

(1) court of appeals erred in applying (b)(2) as opposed to (b)(3). The court has ignored that Fields has met the conditions to opt out. The court further erred when it said that the Petitioner met (b)(2) when it should have been (b)(3) by refusing to address the opt out issue altogether. He

met all the conditions and did not have an attorney;

(2) court of appeals erred by ruling that the settlement was fair to the entire class, including opt outs;

(3) court of appeals erred by ignoring the arbitrary manner that the reinstatement list was established and the harassment and reprisal that the Petitioner suffered during the settlement process;

(4) court of appeals erred in ruling that the reinstatement of the four nontenured officers was fair without rectifying why the Petitioner was a nontenured officer had his name arbitrarily removed from the list.

The Supreme Court should accept the district court's decision because the court allowed those who opposed the settlement due to unfairness to opt out to pursue their individual cases.

Fields is not only unhappy about the monetary settlement, but to reiterate, he was not even given the opportunity to be employed once again through reinstatement. The question is why? Why was there nonconsideration for the nine opt outs?

Those class members that chose not to question racial discrimination practices were placed on the reinstatement list, received back pay, retirement, benefits and everything else and were not even expecting it. Without employment via reinstatement for even an application, Fields is dead employment wise. He has no vehicle to go back to the district court because the court of appeals ruling caused a dismissal of his case.

If this court were to reverse the court of appeals on the issue of opting out of Rule 23(b)(2) or that the settlement was unfair to the "opt outs", the Petitioner would finally be able to resolve his long standing case in the district court. To date, the erroneous no opt out ruling of the court has deprived the Petitioner of his individual right to bring his case into court for resolution. The basic issue is one of fairness.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated, November 4, 1998

Respectfully submitted,

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APPENDIX

STATEMENT ON CLASS ACTIONS FOR THE COURTS AND INTELLECTUAL PROPERTY SUBCOMMITTEE OF THE COMMITTEE ON JUDICIARY OF THE HOUSE OF REPRESENTATIVES

March 5, 1998

***By John P. Frank*[1]**

as invited by the Committee

My name is John P. Frank and I am the senior partner of the law firm of Lewis and Roca, Phoenix, Arizona. I served as a member of the Committee on Civil Procedure by appointment of Chief Justice Warren, as that committee existed in the 1960s when Rule 23 was created. Since that time, I have been involved as a witness or otherwise in a great number of matters relating to the jurisdiction of the federal courts and their procedure. I have been an emeritus but participating member of the Civil Procedure Committee for a number of years, including the years in which Rule 23 has been reexamined. I have repeatedly appeared before this Subcommittee and its Senate equivalent on one or another matters of procedure or jurisdiction. I was chairman for many years of the Arizona state procedure committee, which is essentially identical with the federal system, and have taught jurisdiction and procedure variously at Yale University, the University of Arizona, Arizona State University, and the University of Washington; and I have lectured throughout the country

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[1] Lewis and Roca LLP, 40 North Central Avenue, Phoenix, Arizona 85004-4429, 602/262-5354. He has received no federal grant, subcontract, or contract from any federal source within the past two years.

on these topics. My WHO WHO's and MARTINDALE-HUBBELL squibs are attached to this statement as Exhibit A.

I have had kindly recognition for involvement in work of this kind, most recently the receipt of the Lewis F. Powell, Jr. Award of the American Inns of Court Foundation in a ceremony performed at the Supreme Court. Others who have preceded me in that award include Justice Powell himself, Justice Brennan, and Judge John Minor Wisdom of the Fifth Circuit Court of Appeals.

I. ORIGIN OF RULE 23.

Rule 23, on which the basic committee work was done in 1962 and 1963 and which was promulgated in 1966, must be seen as part of both its professional and its social times. The social setting had a most direct bearing on this rule. Rule 23 was in work in direct parallel to the Civil Rights Act of 1964 and the race relations echo of that decade was always in the committee room. If there was a single, undoubted goal of the committee, the energizing force which motivated the whole rule, it was the firm determination to create a class action system which could deal with civil rights and, explicitly, segregation. The one part of the rule which was never doubted was (b)(2) and without its high utility, in the spirit of the times, we might well have had no rule at all.

The other factor is that 1964 was also the apogee of the Great Society. President Johnson was elected with the most overwhelming vote ever, as of that time, achieved by anyone. A spirit of them versus us, of exploiters who

must not exploit the whole population, of a fairly simplistic good guy – bad guy outlook on the world, had its consequences.

One other element of the time must be identified: This was a world to which the litigation explosion had not yet come. The problems which became overwhelming in the eighties were not anticipated in the sixties. The Restatement (Second) of Torts and the development of products liability law was still in the offing. The basic idea of a big case with plaintiffs unified as to liability but disparate as to damages was the Grand Canyon airplane crash. A few giant other cases were discussed but, as will be shown, they were expected to be too big for the new rule.

Put at its simplest, what new Rule 23 did, first, was expand the true class action somewhat, (b)(1); second, make sure that suits against segregation, as well as other civil rights cases, would be within the class action rule and would be binding as to all members of the class liberally conceived, (b)(2); and third, the one time spurious class action which has been restricted to actual parties was turned into a binding res judicata procedure which could cover a universe as large as notice could reach. It is, I believe, true that (b)(3) was the most radical bit of rulemaking since the original rules created one cause of action and abolished key distinctions between law and equity. The committee repeatedly spoke of it as a "crowning accomplishment."

It was perfectly apparent to the rules-makers of the time that they were doing big things. The critical meeting was October 31 and November 2, 1963, and the most

sharply disputed question was whether to have Rule (b)(3) at all.

There were two levels of concern over (b)(3), apart from details. Remember, the possibility of group securities actions, of RICO and of products liability were still in the future. The sharp practical concern was that major defendants charged with tort liability could readily rig what I will unkindly call a patsy class, arranged to have it sue, have the class take a dive, and thus let the defendants avoid responsibility. It was perceived from the beginning that the class action had the potential of turning the courts into merchants of res judicata, selling that valuable asset at a manipulated price. That was the practical problem and it was more than hinted at from time to time. Remember that this was the era of the Great Society, and "big business" has a very limited stock of trust.

So much for the underlying policy resistance. The legal form which this resistance took was that it was morally and constitutionally wrong to deprive people of their causes of action without their consent. Mind you, this is not long after such cases as *Sipuel v. Oklahoma* or other of the great civil rights cases which had heavily stressed that individual legal rights were personal, not fungible. There was an intense sensitivity to the fact that people should not be swept into a basket; that their rights were independent and personal to them.

Had this problem of individual rights not been solved in a fashion which satisfied that committee, I think there never would have been a (b)(3). There was great concern that in mass torts perhaps there should be no

class actions at all. Professor J.W. Moore gave the illustration of the Ringling Bros. mass tort, the fire in the tent at Hartford. He said that any compulsory class action "goes against my grain of the right of the litigant to run his own lawsuit"; and he repeated a concern I had expressed earlier that "the Pennsylvania Railroad, or some other alleged tort feasor" might take "the initiative to force a concourse of plaintiffs in a particular jurisdiction. I can't think of anything nicer for the general counsel of the Pennsylvania Railroad in the Perth Amboy situation, than your class suit rule."

It was at that moment that committee member Judge Charles Wyzanski had his flash of genius. He responded to Professor Moore, "Would you be satisfied, Professor Moore, if the class could *never* include anybody who specifically protests within a given period?" Professor Moore responded, "That would be helpful" and the principal opponent of (b)(3) added, "If that were done, my problem would evaporate."

Thus, the opt-out concept was born and quickly adopted. Again, it must be perceived that this was not the conception of the "opt-out" of today because the really large class action had not yet been conceived of. Judge Wyzanski was thinking of relatively small classes, and he said of the individual claimant, "If he cares enough to conduct his own litigation," he should "be allowed to do it. He must affirmatively care." Again, it was here assumed that opt-out was an actual conscious choice of a person who had a meaningful alternative to bring his own action. It assumed that the interest of the individual was large enough so that the option of bringing one's own action was a meaningful option. The concept of

thousands of notices going ceremonially to persons with such small interests that they could not conceivably bring their own action was still in the future. The committee thought that it was making a major policy decision and not that as a practical matter it was simply going to either subsidize or burden future branches of the United States postal system with superfluous mail.

I make this a little more innocent than it was. Professor Kaplan raised the possibility of very large numbers of claims. A couple of other examples were given. But Judge Wyzanski was firm that all those people, even in a giant case, would have to have notice:

> I think you also have to make a finding that the form of notice to be used would in all probability reach all persons in the proposed class. And I think it quite clear that in [an enormous case involving thousands] you could not make any such finding. I don't think that case is a class action except for those people who can be reached.

It is a great tribute to Judge Wyzanski's foresight that the Supreme Court has since held that notice and an opportunity to opt out is constitutionally required in class money claim cases. *Phillips Petrol. Co. v. Shutts,* 472 U.S. 797, 812 (1985).

It is with that understanding that the rule was adopted and it was with that understanding that the notes contain the famous restriction that this rule would rarely, if ever, be used in mass tort cases. As a member of the committee, I dissented from the (b)(3) portion of the rule on the grounds that the classes would be too easy to rig and that if a pharmaceutical drug case were filed in

state A, a user in state B should not be compelled to hire a lawyer to determine whether or not he should opt out.

II. EXPANSION.

The number of class actions following immediately upon the adoption of the rule was small. That is no longer the case. The number now runs into the low thousands. As the cases become bigger, the number of cases closed declines, so that there are an ever-larger backlog. We are now in the era of the billion dollar or several billion dollar aggregate actions; some big ones are Agent Orange, Dalkon Shield, and DES. Some of these big cases have been class actions, while others have been pulled together under the multi-district panel system. The common areas are torts, antitrust cases, securities cases, and RICO or consumer fraud cases.

III. PROBLEMS.

A. The Fix.[2]

Quite clearly the fear of some, of whom this writer was definitely one, was that the rule would invite trouble by giving prospective defendants an opportunity to rig classes which might be cheaply bought out. The 1963 spectre has not, in fact, arisen to haunt the system. This phase of the federal district courts becoming merchants in the sale of res judicata has not occurred.

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[2] In this section, I am reporting on the commercial and tort cases, not the "good cause" cases, such as the environmental actions.

But its cousin has. Potential defendants have not had to create phony cases. The "take a dive" plaintiff class has instead been empowered by the attorney who purports to represent the class – the attorney for the fair and adequate representative according to the rule – who is prepared, in effect, to take a bribe in which he gets a lot and the members of the class get very little. Such arrangements are also called "sweetheart settlements with defendants, trading a portion of the compensation due victims for a premium on, or merely the certainty of, the fee recovery." D. Rosenberg, *Class Actions for Mass Torts*, 62 Ind. L.J. 561, 583 (1987).

For want of statistical evidence, one must become anecdotal, and I report from anecdote that this phenomenon exists. As § 3042 of the Manual for Complex Litigation Second (sometimes called by the judges the Complex Manual for Litigation) recognizes, "counsel for the parties are the main source of information concerning the settlement." Of course the judge should review the settlement and of course there should be opportunity for protest, but with the backlog of thousands of class actions pending, with presumably all of them before very busy judges, and with judges bringing uneven levels of ability to the task – not all of them are a Judge Pointer or Judge Weinstein or Judge Higginbotham – settlements can be perfunctorily swept through.

A recent illustration of an extraordinarily meticulous fee study is that of Judge William Browning in a $600 million matter, largely though not entirely affirmed after close thought in *Washington Pub. Power v. City of Seattle*, 1994 W.L. 90327 at 9 (9th Cir. Mar. 23, 1994). This was a seven-and-a-half-year case. It took a law clerk one year,

full time, to analyze the fee claims and the judge over three weeks to utilize the data and reach his result. As is observed in a very substantial Stanford Law Review article, judicial review of the records in a big case "seems a positively breathtaking waste of an article III judge's time," and this review usually results in "a few generalities about the uncertainty of recovery" and a contingency multiplier. J. Alexander, *Do the Merits Matter?*, 41 Stan. L. Rev. 497, 578-79 (1991). As has been said in a very constructive analysis, "Ultimately, the most persuasive account of why class actions frequently produce unsatisfactory results is the hypothesis that such actions are uniquely vulnerable to collusive settlements that benefit plaintiffs' attorneys rather than their clients." J. Coffee, *Plaintiffs' Attorneys in Class Actions*, 86 Col. L. Rev. 669, 677 (1986).

This does not, by any means, always happen. A splendid example is of a large securities fraud case pending in the district court in Louisiana. A settlement was negotiated in which the security holders would receive 1.7 cents return on each dollar invested, minus 25 percent for legal fees, essentially a penny on the dollar. The net return to the investors, in short, was slightly over one percent and counsel fees were proposed to be $7 million.

This one was gross enough to raise a howl and a national television program highlighted it. This led to a protest. The judge did take steps to reject the proposal and a later, different and fairer settlement was worked out. But in most settlements, there is no television coverage and the sense of scandal is not large enough, nor the potential awards great enough, to engender an effective protest.

As this thought has been politely put, "Because the economic interests of the attorney and the class may conflict, the attorney may negotiate settlement terms that do not reflect the interests of the absentee class." Note, *Abuse in Plaintiff Class Action Settlements*, 84 Mich. L. Rev. 308 (1985). Without any venality, but simply as a matter of business judgment, as Judge Friendly has observed, the attorney may have an advantage in taking a smaller settlement bearing a higher ratio to the cost of work than a larger settlement obtained after extensive discovery, trial and appeal. *Saylor v. Lindsley*, 456 F.2d 896, 900 (2d Cir. 1972).

The hazard of this conduct was greatly increased by the United States Supreme Court decision in the matter of *Jeff D. v. Evans*, 475 U.S. 717 (1986). It had previously been the rule in some circuits – the lead case was from the Third Circuit, *Pandrini v. National Tea Co.* 557 F.2d 1015, 1021 (3d Cir. 1977) – that the settlement on the merits and the determination of legal fees must be truly separate episodes so that the merits would be determined at one time and the legal fees at another and later time. This reduced the bribery potential. But the Supreme Court in *Jeff D.* held that both of these matters could come on at once, so that the defendant could settle with the class and settle with the lawyer simultaneously.

I strongly recommend that legislation reverse *Jeff D.*

This has not improved the returns to the classes. As Professor Kane has observed with respect to settlement proposals which "explicitly provide for large attorney's fees, . . . the court cannot rely on opposing counsel to assure a full adversary presentation of the attorneys' fee

application because, having reached a settlement, the class opponents have no interest in how the fee issue is resolved." M.K. Kane, *Of Carrots and Sticks*, 66 Tex. L. Rev. 385, 398 (1987). Moreover, as the Ninth Circuit has observed, "the relationship between plaintiffs and their attorneys turns adversarial at the fee-setting stage." *Washington Pub. Power v. City of Seattle, supra.* For another discussion of "the pressures on class lawyers to settle and obtain fees rather than maximize the benefits to the class," *see* L. Grosberg, *Class Actions and Client-Centered Decision Making*, 40 Syracuse L. Rev. 709, 776 (1989). Let me be very explicit. Nothing in this aspect of the fee problem makes the defense attorney look any better than the plaintiff's attorney.

B. Fees.

We have no clear-cut analysis of the extent to which Rule 23 deserves the title occasionally given to it in casual talk among lawyers as the Lawyers Relief Act. The disproportion of the returns to members of the class and the returns to the lawyers who represent them is often grotesque. In many cases, the individual members of the class are entitled to receive at most a dollar or two, while the attorney who secured this benefaction for them can retire on his share of this victory. This Relief Act aspect of course cuts in both directions because the defense bar must also be paid a sizeable sum for its efforts to keep the recovery down. As is developed elsewhere, "the paramount motivation for such litigation [is] counsel's desire to generate substantial fees." Note, *Attorneys' Fees in Class Action Shareholder Derivative Suits*, 9 Del. J. Corp. L. 671

(1984), citing *Zeffiro v. First Pennsylvania Bank*, 581 F. Supp. 811, 813 (E.D. Pa. 1983).

The result by the 1980s and the present time, by way of historical development, has been oft times to create a giant churn. The plaintiffs' lawyers are busy, the defendants' lawyers are busy, the courts are busy, and the cream that should rise to the top from all of this churning is frequently only a drop or two for those whom Rule 23 was designed to benefit. For a strenuous attack on counsel fees, *see* J. Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497 (1991), giving one illustration of a thousand dollar an hour fee. The article also illustrates the use of special masters as judges try to take control of the detailed analysis of some of these claims.

The common argument in favor of allowing class actions to proceed with pittance returns to the beneficiaries is that this serves as a social regulatory mechanism and helps to avoid future abuses of the general public. Collateral to this is the argument that at least some of these cases are brought by organizations generally well regarded for good works in behalf of consumers or other beneficiaries and that the fees helped to sustain such organizations. However, there has never been a mediated analysis as to whether this form of social regulation for consumers or the environment is better handled by government agencies or by the courts, nor whether the burden on the court system over-balances the value of this indirect form of social legislation and administration.

A different solution to the minuscule recovery and the large fee is the concept of "fluid recovery." The development of this device, largely in the past fifteen years, is set out in J. Solovy and others, *Class Action Controversies* at 140-42 (1994). For example, when members of the class would get only two dollars a piece, the only winners are likely to be the attorney and, oddly enough, the defendant because nobody applies for these small amounts and the defendant gets to keep the money. Under the developing notion of fluid recovery, there are other forms of charge without any effort to get anything to the individual plaintiffs. Illustrations are price rollbacks, coupons, and other devices; for discussion, *see* G. Hillebrand and D. Torrence, *Claims Procedure in Large Consumer Class Actions,* 28 Santa Clara L. Rev. 747 (1988).

I attach as Exhibit B a summary of what appear to be abuses, as well as a couple of recent stories from *The National Law Journal* and *The Wall Street Journal* involving the problem of token for the class member and great wealth for the representative.

C. The Class Representation.

1. Who is the representative?

The rule assumed that there would be an honest to God plaintiff or plaintiffs as true representatives of the class. That has become a fiction; the class representative "has been reduced to a little more than an admission ticket to the courthouse and one anecdotal example of the class claim. Class counsel does all major planning and makes the critical litigation decisions." J. Bums, *Decorative*

Figureheads: Eliminating Class Representatives in Class Actions, 42 Hastings L.J. 165, 166 (1990).

The only close analysis in the literature strongly suggesting that no plaintiff is representing the class is the Alexander study in the Stanford Law Review, supra, analyzing nine settlements in securities cases. The stakes in those cases range from $19 million to $95 million. The percentage settlement in seven of those cases range from 20 percent of the stake to 27 percent and four of them are within a two-point spread. The merits of those claims had nothing whatsoever to do with the settlements; the merits could not be so interchangeable. These are cases in which officers and directors are named as defendants and strongly suggest that settlements are made with corporations to get the insiders off the hook.

2. The race for the gold.

The most visibly distasteful aspect of class actions is the race by attorneys to grab the first class claims and thus get to be lead counsel or at least on the steering committee. The ashes from the great fire will not be cold and the corpses barely at the mortuary before someone will have filed a class action; having found one person, dazed but alive, or one widow, the attorney quickly files the action. There is no actual representation of a class at all.

From there on out, the case is churned to warrant more fees. There are cases where the defendant would settle immediately, but is not given the chance.

The development described here is anecdotal and not statistical, but the anecdotes come on high authority. To write this paragraph I have consulted four past presidents of the American Trial Lawyers Association, the number one group of plaintiffs' lawyers. They are unanimous that this practice exists and that it is disgusting; they refer to these speed artists as "The Parachutists." This historical development, they believe, brings shame to the Bar and particularly to their great division of it.

IV. ILLUSTRATION OF CLAIMED SUCCESSES.

Very responsible groups do not share my views on (b)(F). One of those groups is the Alliance for Justice, of which I am a director and ~~for~~ which I have enormous respect. I, therefore, insert here as a balance to my own views – though I am not myself persuaded – the views of the Alliance for Justice on this point, Exhibit C.

V. *AMCHEM.*

Judge Edward Becker of the Third Circuit Court of Appeals, whose opinion is largely affirmed in the important opinion by Justice Ginsburg in *Amchem* at the last session of the Supreme Court, has put a needed major rein on the abuses of settlement classes. The Ginsburg opinion reminds us that Rule 23 sets its own limitations and is to be followed; she puts a sharp check on the endless expansion of the rule by judicial application. She also lays down important restrictions on classes generally and on settlement classes in particular.

VI. RECOMMENDATIONS.

The Congress must decide to what extent it wishes to reconstruct Rule 23 by legislation and to what extent it wishes to leave this to the Rules Committee structure. I personally believe that the rule has become so abusive that running reform on double track is a good idea, and some portions of what is necessary would in any case require congressional action. Specifically:

A. The Approach.

I approach this topic from the liberal standpoint, and have no reluctance about social engineering through law. But the rules structure was not created to make the rules committee into social engineers. If social changes are desired, the Congress and the Executive department through its agencies should take the responsibility of policy and enforcement. I am wholly persuaded of the view expressed by Judge Paul Niemeyer, the present Chairman of the Civil Rules Committee of the Judicial Conference in his response to the parallel Senate committee on this subject. He was asked whether he thought it desirable for Rule 23 to be used as a social tool to enforce laws through attorneys essentially acting as private attorneys generally:

> I believe that Rule 23 was never intended to be a tool to enhance enforcement of substantive claims. Rather, I believe, it was designed as a procedural device to facilitate the aggregation of claims for judicial efficiency. Others, however, believe that while judicial efficiency may have been the original intent of Rule 23, the rule has

> transformed by use into a mechanism to enhance substantive enforcement with the result that it actually supplements or even displaces government regulation. While there is plenty of evidence to support this observation, if it were to be legitimized as a purpose for Rule 23, such legitimization should, in my judgment, be effected by Congress, and Congress might well conclude that it is too anarchial to authorize private attorneys to self-appoint themselves as enforcers of laws without adequate accountability to the lawmakers or to the public.

Response to Senator Grassley, December 16, 1997, Question No. 2.

B. Removal.

The Judicial Code should be amended to permit removal of class actions from state courts whenever an industry involved in interstate commerce is involved. Since John Marshall's time, it has been the interpretation of the diversity statute that there must be total diversity in order for a case not involving a federal question to be in the federal courts. In the famous case of *Strawbridge v. Curtis*, the Chief Justice made clear that this was a matter of statutory interpretation and not constitutional necessity. While most courts can handle class actions perfectly well, we cannot blink the fact that there have been some gross abuses where an obscure state court gives res judicata effect to a settlement which binds the entire United States.

C. Codify *Amchem*.

In my view, settlement classes should be abolished; but if we are to have them, then they should, as the Supreme Court has made very, very clear, be held to the same standards as would be a full-scale adversary class action proceeding. I would codify the *Amchem* case to provide that in considering a proposed settlement class, § 23(b)(3)(D) is inapplicable; heightened scrutiny is required as to 23(a)(4) and the other provisions of Rule 23 apply equally to settlement class actions, as well as to all other class actions. The elimination of (3)(D) means that the court will not need to consider "the difficulties likely to be encountered in the management of a class action" because, as Justice Ginsburg sensibly said, if the matter is going to be settled, there isn't going to be any management anyway.

The provision for heightened scrutiny of the (a)(4) element is the insistence that the court look with great care at whether "the representative parties will fairly and adequately protect the interests of the class." *Amchem* makes this of special importance because, to put it bluntly, it is in the settlements that the lawyer may sell out the class for the sake of his pocketbook. In all other respects, the settlement class should have to meet the requirements of all other classes.

D. The Opt-Out.

In matters in which it appears that the recovery of individual members of the class, as distinguished from their counsel, is likely to be small, the proceedings should

go forward as a class only if the proposed members affirmatively, after notice, express a desire to be included in the action. "Opt-in" should be substituted for "opt-out." The object is to take the romance out of class actions in which putative class members have no wish to be involved. It will take the burden off the court by determining this matter early instead of after extended procedures.

E. Settlement and Fees.

The earlier Third Circuit rule should be made national if there is to be settlement; the fees should be independently considered.

F. "Fluid Recovery."

"Fluid recovery" (that is nothing to the class and some general *bonanza* to some public interest) should never be allowed. I refer to such devices as an order which gives nothing to the class but which provides that the defendant dairies should lower the price of milk by two cents a quart for a given period of time. Nothing in the Constitution, the Code, or the rules makes the courts proxies for the appropriation committees of Congress or makes them specialized tax collectors for public purposes.

VII. CONCLUSION.

I conclude by attaching as Exhibit D a letter received by me from Justice Hugo L. Black of the United States

Supreme Court in 1969. Rule 23(b)(3) was a mistake from the beginning and I take some comfort from the fact that so distinguished a person was of the same point of view.

John P. Frank

LEWIS AND ROCA LAWYERS

Areas of Practice:

Mr. Frank is a partner in the firm's Special Litigation Group. His extensive experience includes the areas of appeals, civil litigation and antitrust. Prior to joining the firm in 1954, Mr. Frank served as Law Clerk to Mr. Justice Hugo L. Black during the October 1942 term of the United States Supreme Court. He also was Assistant Professor of Law at Indiana University from 1946-49 and Associate Professor of Law at Yale University from 1949-54 and during that time was associated with the Antitrust Division of the United States Department of Justice.

In 1991, Mr. Frank was named for the third time to the *National Law Journal's* list of the "100 Most Influential Lawyers in America." He is also listed in the current (1996-97) edition of *Best Lawyers in America.*

Mr. Frank has been involved in more than 500 appeals in his years with the firm. These include many cases at the Arizona Court of Appeals, the Arizona Supreme Court, the Ninth Circuit Court of Appeals, other federal circuits, and the United States Supreme Court. A recent appeal concerned the premium required to be paid by physicians at the University of Arizona Medical School for malpractice insurance and resulted in client savings of over seven million dollars. He continues to be active in state trial courts and federal district courts, where he has represented the motion picture industry in antitrust litigation, has recently represented a newspaper on antitrust and contract issues, and is currently representing an air

tanker contractor in federal district court litigation on an issue of whether certain planes were properly acquired.

Mr. Frank is frequently called upon for opinions, as for example, the water rights of an Arizona Indian tribe. His professional work is entirely occupied with litigation in a variety of forums, in legal matters either in anticipation of litigation or seeking to avoid litigation.

Professional Activities:

Mr. Frank is a member of the Maricopa County Bar Association, the State Bar of Arizona and the American Judicature Society. He is on the Council of the American Law Institute and is a Fellow of the American Bar Foundation.

From 1960-70, Mr. Frank was a member of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States and continues to meet regularly with it; a member of the Arizona Salary Commission from 1970-82; and a member of the Arizona Appellate Court Nominating Committee from 1972-84 and chairman of the nominating commission for the U.S. Court of Appeals, 9th Circuit (Southern) from 1977-1980.

Mr. Frank serves as general counsel to the Arizona Democratic Party. He is a Director for the Alliance for Justice (headquartered in Washington, D.C.) and a member of the Senior Advisory Board for the Ninth Circuit of Appeals. A former board member of the Phoenix Art Museum, he is very active in pro bono litigation.

JOHN P. FRANK, born Appleton, Wisconsin, 1917; admitted to bar, 1940, Wisconsin; 1954, Arizona; 1966, District of Columbia. *Education:* University of Wisconsin

(B.A., 1938; M.A., 1940; L.L.B., 1940); Yale University (J.S.D., 1947). Awarded L.L.D., by Lawrence University, 1981, Order of the Coif. Recipient, Harley Award, 1984. Author and Editor: "Cases and Materials on Constitutional Law," Callaghan & Co.; "Cases on the Constitution," McGraw-Hill; "Mr. Justice Black," Alfred A. Knopf, Inc.; "Marble Palace, The Supreme Court in American Life," Alfred A. Knopf, Inc.; "Lincoln as a Lawyer," University of Illinois Press; "Justice Daniel Dissenting," Harvard University Press; "The Warren Court," The MacMillan Co.; "American Law: The Case for Radical Reform," The MacMillan Co.; "Clement Haynsworth, the Senate, and the Supreme Court," University Press of Virginia. Assistant Professor of Law, Indiana University, 1946-1949; Associate Professor of Law, Yale University, 1949-1954. Law Clerk to Mr. Justice Hugo L. Black, October, 1942, term. Member, Committee on Rules of Practice and Procedure of the Judicial Conference of U.S., 1959-1970. Member: Arizona Salary Commission, 1970-1982; Arizona Appellate Court Nominating Committee, 1972-1984. Chairman, Merit Selection Committee, U.S. 9th Circuit, South, 1977-1979. *Member:* American Law Institute (Member, Council, 1973-); American Judicature Society. Fellow, American Bar Foundation. *Appeals. Civil Litigation. Antitrust.*

FRANK, JOHN PAUL, lawyer, author; b. Appleton, Wis., Nov. 10, 1917; s. Julius Paul and Beatrice (Ullman) F.: m. Lorraine Weiss, May 11, 1944; Children – John Peter, Gretchen, Karen, Andrew, Nancy. B.A., U. Wis., 1938; M.A., L.L.B., 1940; J.S.D., Yale U., 1946; L.L.D. Lawrence U., 1981. Bar: Wis. 1940, D.C. 1966, Ariz. 1954, U.S. Supreme Ct. 1945. Law Clk. U.S. Supreme Ct. Justice

Hugo L. Black, 1942; asst. to sec. interior, 1943, to atty. gen., 1944-45; asst. prof. law Ind. U., 1946-49; assoc. prof. law Yale U., 1949-54; vis. lectr. U. Wash., 1966, U. Ariz., 1967, Ariz. State U., 1969, 72: mem. firm Covington & Burling, Washington, 1947, Arnold & Porter, Washington, 1948, 53, Lewis and Roca, Phoenix, 1954 –; mem. adv. com. civil procedure Jud. Conf. U.S., 1960-70: mem. exec. com. Adv. Com. on Appellate Justice, 1970-73. Democratic precinct committeeman, 1956; counsel Ariz. Dem. Com., 1962-65, 78-83. Mem. ABA, Am. Law Inst. (council), Am. Bar Found., Maricopa County Bar Assn. Clubs: Arizona, University (Phoenix). Author: Mr. Justice Black, 1949; Cases on Constitutional Law, 1950; Cases on the Constitution, 1951; My Son's Story, 1952; Marble Palace, 1958; Lincoln as a Lawyer, 1961; Justice Daniel Dissenting, 1964; The Warren Court, 1964; American Law: The Case for Radical Reform, 1969; contbr. articles to profl. jours. Federal civil litigation. State civil litigation. Home: 5829 E Arcadia Ln Phoenix AZ. 85018 Office: 40 N. Central Phoenix AZ. 85004-4429

Front Pay for Odie Fields
Computed for the Period 1/1/95 – 12/23/07
Reinstated at Grade 02, Step 07

Year	(1) Jan Salary	(2) 894 Adjustment	(3) Promotion or Step Increase	(4) Dec Salary	(5) Present Value
1995	$64,447	----------	$1,933	$66,380	$60,305
1996	$66,380	$2,522	$1,991	$70,893	$59,865
1997	$70,893	$2,694	$2,052	$75,639	$59,366
1998	$75,639	$2,874	$2,112	$80,626	$58,814
1999	$80,626	$3,064	$2,176	$85,865	$58,212
2000	$85,865	$3,263	$2,507	$91,635	$57,609
2001	$91,635	$3,482	$2,317	$97,434	$57,047
2002	$97,434	$3,703	$2,386	$103,523	$56,326
2003	$103,523	$3,394	$2,457	$109,914	$55,572
2004	$109,914	$4,177	$2,211	$116,302	$54,752
2005	$116,302	$4,419	$6,311	$127,032	$54,248
2006	$127,032	$4,827	$0	$131,859	$54,322
2007	$131,859	$5,011	$0	$136,870	$52,369

Total: **$738,806**

Attorney Work Product